

Notary Role in the Development of Sharia-Based Economy

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ABSTRACT

The majority population of Indonesia is Muslim and thus, is a large market share to develop business with the sharia economic system. The presence of a notary is necessary to ensure legal certainty for the community in conducting transactions in sharia. The method used in this study was normative juridical using secondary data. The results indicate that the Notary is a public official who is authorized to conduct authentic deeds and has other authorities based on the Act of Notary Position. Notaries play a role in supporting the development of sharia-based economy, such as drafting Islamic contracts in Islamic banking or other financial institutions. One of the potential disputes in sharia economic transactions is one or more parties who practice transactions without following the sharia principles. This is because one of the defaulters did not implement the contract consisting of the notarial deed they agreed to. The urgency of deed Notary in sharia economic transactions is vital to guarantee the rights and obligations of parties involved in the contract. The making of authentic deeds is undertaken in the framework of creating certainty, order, legal protection, and to avoid future disputes.

Keywords: *Notary, development, sharia economy*

1. INTRODUCTION

Indonesia, a Muslim majority population, produces large marketing to develop business in the sharia economic system. Sharia economics is an economic system based on Islamic principles, that must be in accordance with the Qur'an and Hadith. The development of sharia economics in Indonesia in the last ten years has shown rapid progress, as can be seen after the establishment of several sharia-based financial institutions, such as sharia banking, sharia insurance, sharia capital markets, and sharia hotel. The discourse of the sharia economic system begins with the concept of economics and business without usury.

The formation of a stable economy is due to the sharia system, which can eliminate and prohibit activities that are non-productive, forbidden, dangerous, non-beneficial and speculative. This condition will encourage an increase in resource utilization, reduce inflationary pressures, and overcome economic crises so as to facilitate the achievement of planned economic goals. In the growth of the sharia economy, supports from legal professionals are needed to oversee and support the continued development of the sharia business. The legal sector that highly supports the process of sharia business contracts or transactions is a notary. The presence of a notary is required to ensure the legal certainty and protection for the public in conducting sharia-based transactions.

The notary public is the only official authorized to certify an authentic deed regarding all contractual arrangements and stipulations required by general rules or by interested parties to be declared as an authentic deed,

such as guarantee certainty of the date, keep the deed and provide a grosse, copy and quote. All along the deed, by a general rule, is also not assigned or excluded to officials or others. The existence of a notary in a sharia business contract is very important, given that his/her main task is to create an authentic deed that is needed as evidence that a legal event has occurred. As a general official creating an authentic deed, a notary is required to have a good personality, work independently, honestly, impartially, and full of responsibility. In addition, the Notary is also required to have skills or expertise in the field of law for which he has competence. Not only he/she must be competent but also he is required to provide legal counseling to his/her clients to achieve high legal awareness, which is to realize and exercise their rights and obligations [1].

The existence of a notary in supporting sharia-based economic is to create or implement the contracts based on sharia principles. A contract is a determinant, a parameter that determines a transaction to be valid or not. As overall transactions occurred in daily life are part of the contract, so it can be said that the contract is the root of all transactions. If in a transaction or contract conducted based on sharia principles and stated in a notarial deed drawn up by a Notary, the parties are deemed to have agreed to all the contents of the contract in the notarial deed, because by signing the deed, the parties are considered to understand all the contents of the deed, and consequently the parties must observe their rights and obligations following the contents of the deed.

In line with the previously describe circumstance, this study aimed to look at the role of the Notary in supporting the economic growth of sharia-based businesses

by implementing sharia principles in the authentic deed s/he made. The method used in this study was normative juridical using secondary data.

2. Urgency Of Notary Deed In *Shari'ah* Economic Transactions

A legal act, carried out by creating an agreement in the form of a contract with a notarial or authentic deed in an economic transaction based on sharia law, must meet the provisions based on the Law of Notary Position (UUJN) and the Fatwa of the National Sharia Council of the Indonesian Ulama Council, the Sharia Supervisory Board and Bank Indonesia. The deed signed by the Notary to be an authentic theoretical deed is a letter or deed that was intentionally made deliberately for proof. The initial intention is that the letter is made as proof later in the event of a dispute between the parties [2].

Law Number 2 of 2014 on amendments to Law Number 30 of 2004, concerning the Position of Notary Public, states that there are two types or classes of notary deeds, which are the deeds made by Notaries referred to as the Deed of Relas or Provisional Deed and the deeds made at before a Notary Public, commonly referred to as the Party Deed. Regarding the deed of relas, that is a deed made by a Notary that contains "relas" or describes authentically on an action taken or a condition witnessed by the maker of the deed, namely the Notary himself, in carrying out his/her position as a Notary. While the party deed contains a "statement" of what happened because of an act carried out by another party before a Notary, meaning that is explained or told by another party to the Notary in carrying out his/her position and for what other parties purposefully comes before the Notary and provides information or do that action before a Notary so that the statement or action is notified by a Notary in an authentic deed.

According to Habib Adjie, Article 1 number 13 of the Sharia Banking Law confirms that a contract is a written agreement, meaning that all forms of contract or deed in Islamic banking must be in written form and not required in other forms. This article is a mandatory rule [3]. Furthermore, the contents of the written agreement must include the rights and obligations of each party in accordance with sharia principles. One of the main provisions of the agreement in Islamic law is regulated in the Al-Baqarah verse 282, namely: "O believers. If you owe a debt for a specified time, you should write it down. And let a writer among you write it correctly. Let the writer refuse to write it as God has taught him, so let him write it. And let the one who owes it dictates, and let him fear Allah, his Lord, and let him not reduce the slightest of it. If the person who is in debt is someone who has little sense or is weak (his condition) or is unable to dictate himself, then his guardian should dictate it correctly. And witness with two male witnesses among you. If there are no (witnesses) two men, then (it is permissible) a man and two women among the people you like from the witnesses (existing), so that if one forgets the other reminds him...". Surah Al Baqarah verse 282 shows that in *muamalah* or dealing or transacting

in Islamic economics must be written in a deed that is in the contract agreement so that each party has a proof that they have agreed to an agreement and must obey it following the contract agreed. And the contract s/he made was a notarial deed which had a binding legal force for both parties [4].

The purpose of the order in surah Al Baqarah verse 282 is very clear, that is to maintain justice and truth emphasizing the accountability. In other words, Islam considers that economic transactions (*muamalah*) have a very high value so that the recording can be used as evidence, with the hope that certain parties will not violate the agreement made. The agreement that is stated in the notarial deed must be fully understood to be carried out as thorough as possible in following the contents of the deed. Every form of commerce that is not in cash must also be written in the form of a written agreement. The rationale is that the written agreement can be used as evidence if one day there is a dispute due to forgetfulness concerning the contents of the agreement or the intentions of one party to cheat on another party [4].

In a sharia-based business agreement, the contract must be fair or impartial to one of the parties. Therefore, the profession of writing a contract transaction is a notary that has relevance and urgency in transactions based on the teachings of Islamic law, especially, a Muslim notary who understands the principles of sharia (Islam). Thus, the role of the Notary is necessary to provide legal opinions to the parties making agreements that must not violate Islamic law and applicable law in Indonesia.

The study of the phenomenon of a notarial deed in sharia law means that there is a merging of the two poles of the law, namely western and Islamic civil law. Islamic legal principles by prioritizing the *muamalah* principle; specifically, this principle is categorized into two terms as follows [5].

1. Things that are prohibited from being carried out in *muamalah* activities, namely the object of trade or commerce must be halal and *thayyib* (beneficial) according to the willingness and safe management. The concept of halal object emphasizes the existence of halal elements and not conducting a business that is forbidden in Islam, such as selling liquor, *najis* (dirty from an Islamic perspective), gambling-related and others.
2. Things that are prohibited from committing, including usury, namely any additional loan originating from the excess of the principal value given to the creditor. Then, it is the *Takhir*, that is, which is the object of commerce is not owned, the existence is unknown, cannot be submitted on time, resulting in the debtors experiencing losses, regrets, and danger, as well as *Tadlis*, namely fraud for the defect of goods traded.

The principle of a contract in Islamic law is like a treaty or an agreement, as outlined in a deed in general. The contract in Islamic law is known as a contract between two parties based on the principle of agreement that is preceded by an offer and acceptance (*Ijab-qabul*) regarding a certain object. The application of phrases or words like "*bismillahirrahmanirrahim*" in the notarial deed in sharia

law signifies that the contract made refers to sharia law sourced from the Qur'an and the Hadith [6].

3. The Needs Of Sharia Notary In Supporting -Sharia-Based Economy

For an agreement to have legal force, it must be recorded before a notary. Therefore, every business, including the sharia business, always requires a notary as an official who creates an authentic deed in accordance with his/her duties stipulated in the Law of Notary Position. In addition, the notary is also authorized to provide legal advice to his clients to achieve their rights and obligations, so that the transaction promised before the notary public is not legally flawed. To date, the position of a notary is still respected in society. A notary is usually considered as an official where someone can get reliable advice. Everything that is written and enacted is true, s/he is a strong document maker in a legal process [7].

In the development of sharia business, the existence of sharia notary who understands well about sharia-based contracts or transactions is essential. So, among the notaries, conventional and sharia business are closely related, like two sides of a coin.

Considering the existence and task of the strategic and challenging notary, it should be in line with the rapid development of the sharia business. It is necessary to immediately initiate the creation of a sharia notary, namely a notary who has the competence in the field of Islamic civil law and sharia business. The urgency of sharia notaries is based on the following reasons [8].

- a. Most notaries currently do not understand the theoretical and practical aspects of sharia business law. Moreover, their educational backgrounds are law degree and master of notary ;
- b. The legal aspects of sharia business are different from a conventional business, both in terms of philosophical and technical aspects of the contract;
- c. In practice, in sharia financial institutions, especially banks, there are still many sharia business contracts that violate the provisions of sharia regulations. This occurs because the notary who handles them only legalize the contract without directing the contents of the contract because of its limitations;
- d. Along with the expansion of religious court competence to resolve disputes that occur in Islamic financial institutions, a competent notary is needed in formulating sharia business contracts, so that a balance of ability (competence) between various legal professions will be realized, which in turn will affect the quality of law enforcement in Indonesia.

The term sharia notary is still unfamiliar to the public, but a sharia notarial deed is required as a back-up for the existing notary who does not understand about the sharia contracts, which are often used in Islamic financial institutions, while they are often witnesses in the transaction. Therefore, in the discourse of jurisprudence, a popular rule is known, i.e., *taghayyur al-ahkām bi 'l-taghayyuri alamkān wa al-azmān*, which means changing the law is in line with changes in

place and time. In the past, the sharia notary was less important, but due to the development of sharia banking in Indonesia, the presence of the sharia notary is highly anticipated.

For realizing the sharia notary in Indonesia, several steps must be conducted, including:

1. An educational program (Bachelor level) needs to be established for the expertise of a sharia notary. It may also work to collaborate with certain training institutions so that each notary who handles sharia banking or sharia financial institutions must take the training test. Thus, the notary has the opportunity to handle or be involved in the sharia economy, as long as he has these competencies;
2. In organizing the notary master degree, it is necessary to add contract material or sharia business in the curriculum to balance the understanding of positive law and sharia law (especially *mualamah maliyah*). Thus, s/he will contribute to the development of the sharia economy, not only limited to the needs of work;
3. Non-governmental organizations engaged in sharia economy and Islamic tertiary institutions work together with the Indonesian Ulama Council and also the Ministry of Religious Affairs to provide training or education and seminars to notaries to learn about the sharia contract or business;
4. Establishing the requirements to notaries who will become partners in Islamic financial institutions to attend sharia notary training.

In creating sharia-based deeds, the notary must fulfill the legal agreement requirements in *Burgelijk Wetboek* (Civil Code), provisions in the law office of a notary, and the provisions in the legislation of Islamic banking. A deed upon agreement, if it does not fulfill the legal conditions of the agreement, the deed can be canceled or null and void by law. An agreement that does not meet the objective conditions, namely certain objects and prohibited powers, will be null and void by law. Cancel by law means that the legal act is considered never to exist and is not a legal product.

If an agreement does not meet the subjective conditions, namely their agreement to bind themselves and the ability to make an agreement, then the agreement can be canceled. The word "can be canceled" here, means that the request for cancellation can be submitted to the court by proving that subjective conditions are not fulfilled. If the application is not submitted for cancellation in court, then the agreement applies to the parties. If the dispute on the request for a notarial deed assessment is canceled and must be examined by a judge, then the trial will be proven in advance regarding the force of proof of the deed, starting from the formal to material aspects, which then bring the legal consequences of the deed having the power of proof out or not. The examination of the judge is related to the interference of the judge in terms of testing the agreement or notarial deed. The judge will decide whether the breach of the agreement or notarial deed is null or void because of the law or can be canceled. The decision has different consequences, because if it violates the subjective

conditions, it will result in the agreement or the deed can be canceled. On the other hand, if it violates the objective conditions, then the deed is null and void because of the law.

A notary in doing sharia-based deeds aims to support sharia economic growth and must also use existing legal principles; notaries must also pay attention to sharia principles (sharia compliance) in doing a deed. A contract is said not to violate Islamic principles if there is no element of usury, gambling, unclear objects, prohibited objects and transactions that cause injustice to the parties.

4. CONCLUSION

The rapid growth of sharia economy requires legal certainty and protection for the parties in implementing contracts or agreements following the sharia principles. Therefore, the existence of a Notary is essential to support the implementation of sharia-based economy by implementing sharia agreements in the form of notarial or authentic deeds to ensure legal certainty. In creating sharia-based deeds, the Notary is guided by the Law of Notary Position, Fatwa of the National Sharia Council, and the principle of sharia compliance and other positive legal regulations because the notarial deed in sharia law means the merging of the two laws, namely western civil law and Islamic civil law. To guarantee an authentic transaction in the law of the sharia-based business, the sharia notary should be presented in Indonesia to focus on sharia business.

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